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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 175

BEACON FEDERAL SAVINGS AND LOAN ASSOCIATION,
Petitioner,

vs.

FEDERAL HOME LOAN BANK BOARD,
Respondent.

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

	PAGE
Argument:	
I. Timeliness	1
II. Ex Parte seizure	3
III. Seizure when there is another adequate remedy	4
IV. Due process of law	4
Conclusion	5

CITATIONS.

Cases.

Beacon Federal Savings & Loan Assn. v. Federal Home Loan Bank Board, 143 F. Supp. 534	3
Fahey v. Mallonee, 332 U. S. 245	4
Greater Delaware Valley Federal Savings & Loan Assn. v. Federal Home Loan Bank Board, 262 F. 2d 371	3
Service v. Dulles, 354 U. S. 363	5
U. S. v. F. & M. Schaefer Brewing Co., 356 U. S. 227	1
U. S. ex rel. Accardi v. Shaughnessy, 347 U. S. 260	5

Statutes.

5 U. S. C. 1009(c)	3
12 U. S. C. 1464(d)	4

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Now comes the petitioner and replies to the brief for the respondent in opposition.

ARGUMENT.

I.

TIMELINESS.

The respondent undertakes to contend that this case differs from the *Schaefer* case (*U. S. v. F. & M. Schaefer Brewing Co.*, 356 U. S. 227), and he puts it on the ground that the petition for attorneys' fees was 'the first indication that anybody intended or treated the order of June 9 as interlocutory. The facts are that about the only difference between this case and the *Schaefer* case is that

the *Schaefer* case was a petition by the Government and this case is a petition by a private party. In both cases, an order was entered after a decision. In this case, it was called "Order for Judgment." In both cases, a final judgment was entered later. The question in both cases is which was the final judgment. The *Schaefer* case holds clearly that it depends upon the words of the order and the intention of the judge. In this case, the counsel at that time in charge of this case was seeking permission to petition for attorneys' fees before final judgment. It is clear enough from all of the circumstances that he was sitting there in the court when he signed the approval as to form and when the Court's "Order for Judgment" was signed. It seems entirely clear, from all of the circumstances, that not only counsel on the other side but the judge himself agreed to give him time to petition for attorneys' fees before the entry of the final judgment. He was careful enough to get consent from the other side in writing on the subject, as the original petition for certiorari shows. He could have then filed his notice of appeal, if the situation had been otherwise. It now would be very outrageous treatment of him and his client if the Court were to hold, by denial of the petition for the writ of certiorari, that the trial judge did not intend what the "Order for Judgment" tends to indicate, namely, that it was interlocutory, and that the judge did not intend what it is entirely clear from all of the circumstances that the judge indicated at that time he did intend to do.

The cases cited in the brief in opposition have been reviewed, but they merely hold what the *Schaefer* case holds, namely, that the judgment is a final judgment which clearly indicates on its face that it is a final judgment and the trial judge intends it to be such. We still contend that this case must turn on the reasoning in the *Schaefer* case.

II.

EX PARTE SEIZURE.

In response to the contention that it is reversible error to seize, *ex parte* and without notice, when there is no emergency and when an adequate remedy at law is available without seizure, the brief merely cites *Beacon Federal Savings and Loan Association* v. *Federal Home Loan Bank Board*, 143 F. Supp. 534, and *Greater Delaware Valley Federal Savings & Loan Association* v. *Federal Home Loan Bank Board*, 262 F. 2d 371, cases. These cases, as cited, are not at all in point. They merely held that the plaintiff had no standing in court when it had not exhausted its administrative remedy.

Section 10(c) of the Administrative Procedure Act (5 U. S. C. 1009(c)) expressly provides that interlocutory administrative orders and action shall be reviewed in a case such as this. The respondent says that the question has become moot. This is not true. It is not good law to say that an administrative body such as this may seize $29,000,000 of private property, *ex parte* and without notice, and accord such scandalous treatment to private citizens as is evidenced in this case, without any right of review. And yet, the trial court and the Court of Appeals both say these parties have no right to review this completely vital, interlocutory action. They in effect hold that administrative bodies can treat citizens of the United States any way they please, provided that they continue the litigation until they produce some technical basis to sustain their final action. This is shocking Star Chamber procedure and is unconscionable. This ought not to become the law of the United States.

III.

SEIZURE WHEN THERE IS ANOTHER ADEQUATE REMEDY.

The petition says that it is error, as a matter of law, to ignore an Act of Congress and to seize private property when a simple, adequate and complete remedy at law is readily available. The respondent ignores the amendment of 1954 (12 U. S. C. 1464(d), as amended in 1954) and cites *Fahey* v. *Mallonee*, 332 U. S. 245. The said *Fahey* case is not in point here, because it was decided under the Act of 1933, when the Board had broad discretion and no other means of enforcing law and regulations. In 1954, the Congress amended that law and withdrew the blanket discretion of the Board and gave the Board an adequate remedy at law which Congress says it "shall" pursue and retained a discretionary power to seize. It is still good law in this country that it is wrongful to seize property when there is a simple, adequate and complete "remedy at law" readily available, as there was in this case. The Congress expressly provided that the Board "shall" give the notice and provide the administrative procedure for specific trial of issues. It is still error, as a matter of law, to seize $29,000,000 of other people's property for running over a red light or some minor infraction which could be readily corrected, as expressly directed by the Congress.

IV.

DUE PROCESS OF LAW.

Petitioner contends that it has not had due process of law.

Respondent again cites *Fahey* v. *Mallonee*, 332 U. S. 245, which was decided under the old law and is not in point under the 1954 amendment. Respondent does not discuss

the cases of *Service* v. *Dulles*, 354 U. S. 363; or *U. S. ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260, which were relied upon by the petitioner. In those cases, the United States Supreme Court held that when an administrative official voluntarily provides the public with a new and better remedy by regulation and then does not accord that procedure to the defendant, the same is not due process of law. In this case, the Congress repealed a law which gave this administrative body blanket discretion and then voluntarily substituted, for the protection of the public, a specific procedure for this Board to enforce specific law and regulations. It is clear that the public are entitled to what the Congress provided for the better protection of the public. Petitioners contend that to fail to give this petitioner the very valuable right accorded to it by Congress was a failure of due process of law.

CONCLUSION.

For the reasons specified above and in the petitioner's original petition filed herein, it is respectfully submitted that the writ of certiorari should be granted as prayed for.

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September 2, 1959.